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No. 95-211

In The

Supreme Court of the United States

October Term, 1995

MARTIN J. QUINN, and EDWARD C. McREADY,

Petitioners,

v.

ROBERT PITOFSKY, Chairman, Federal Trade Commission, and the FEDERAL TRADE COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION

This is in reply to arguments raised by the respondents in opposition to the instant petition for certiorari to review the lower federal courts' decisions on petitioners' disparate treatment and impact claims brought under the *Age Discrimination in Employment Act* ("ADEA").

ARGUMENT

1. Respondents contend that, although the generation of cost savings was the motive for conducting the RIF, it was not a motive for the specific RIF decisions made by respondent Federal Trade Commission ("FTC") resulting in the discharge of petitioner Martin J. Quinn. Opp. 4-5 *citing*, the district court's *Memorandum Opinion and Order* ("Mem. Op." or "Opinion"), Pet. App. B10-12, B14-15. Instead, respondents posture that Quinn's accountant position, one of the eight pre-RIF positions in the FTC's Bureau of Competition ("BC"), was abolished simply for various non-financial reasons.[1] *Id.*

[1] Respondents failed to address the FTC's motives for the second decision resulting in Quinn's discharge, *i.e.*, the decision not to offer him continuing employment with the agency even though he qualified for a vacant compliance specialist position which was subsequently given to someone else. Pet. App. B10-12, B14-15; *see*, Pet. 5-6, n. 4 and 5. Presumably, respondents would contend that the cost savings motive had nothing to do with this latter decision as well.

To bolster their contention that cost savings had absolutely nothing at all to do with the decisions resulting in Quinn's discharge, the respondents contend that petitioners' argument equating the FTC's cost savings motive to one based on Quinn's pension status and age is flawed. Opp. at 5. The flaw in petitioners' argument, according to the respondents, is that "it ignores the district court's *finding* that the agency did not abolish Quinn's position because his pension eligibility permitted the agency to save money." *Id.* (emphasis supplied), *citing* Mem. Op., Pet. App. B15. Further, the respondents contend that "the district court *found* [that], 'although the BC knew the retirement status of its employees, the decision to abolish Quinn's position was not based on age.' " *Id.* (emphasis supplied).

There are several obvious reasons why respondents' argument and related representations are without merit.

First, the district court *never* made a "finding" that "the agency did not abolish Quinn's position because his pension eligibility permitted the agency to save money," as respondents claim. *Id.* Such a "finding" does not appear on the page of the district court Opinion cited by the respondents (Mem. Op., Pet. App. B15) or, for that matter, on any other page. Nor can such a "finding" be reasonably inferred from any combination of the findings actually made by the district court in this case.

Second, it is clearly wrong for respondents to characterize as a district court *factual finding* its determination that, "although the BC knew the retirement status of its employees, the decision to abolish Quinn's position was

not based on age." *Id.* Rather, the district court's determination in this instance was clearly a legal conclusion -- an erroneous one at that -- drawn from the application of standards of proof adopted by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), for cases in which only legitimate reasons are proffered for challenged employment decisions. This is evident from the fact that the district court made the at-issue determination in the context of its analysis as to whether petitioners met their *McDonnell Douglas/Burdine* "final burden." Mem. Op., Pet. App. B15. In other words, the district court arrived at the at-issue determination as a result of deciding that petitioners had not proven that the FTC's articulated purported legitimate reasons for the challenged employment decisions were not the true reasons. *Id.* Respondents' mistaken portrayal of the district court's legal conclusion as a *factual finding* assumes the very issue in this case -- that standards of proof adopted by this court in *Price Waterhouse v. Hopkins*, 490 U.S. 288 (1989) for cases in which "mixed-motives" (legitimate and illegitimate) exist, rather than *McDonnell Douglas/ Burdine* standards of proof, should have been applied in analyzing the decisions resulting in Quinn's discharge.

Third, the logical inference drawn for the explicit factual findings made by the district court underscores the errors and misrepresentations inherent in respondents' interpretation of the district court's treatment of the cost savings motive -- that interpretation being: the generation of cost savings was a motive for conducting the RIF but not for the specific decisions resulting in Quinn's discharge. The pertinent district court factual

findings are: (1) the RIF was "precipitated by a diminished budget," Pet. App. B2; and (2) "BC was specifically instructed that it had to save $150,000 as a result of personnel actions." *Id.* B10.

Again, it is important to emphasize that the district court did not make a specific factual finding that the cost savings motive played no part in the decisions resulting in Quinn's discharge. Absent such a specific finding, therefore, it is only logical to conclude that all of the RIF decisions made by BC, including the decisions resulting in Quinn's discharge, were motivated by BC's agency-imposed $150,000 cost savings goal. It is simply nonsensical to argue, as respondents do, that BC would make its specific RIF decisions in a vacuum and not consider the contribution those decisions, individually and/or collectively, would make to its $150,000 cost savings goal. Thus, common sense dictates that, if the generation of cost savings was the motive for undertaking the RIF action, it must necessarily also have been a motive for the specific RIF decisions made during its implementation.

Finally, the substantial record evidence in this case more than adequately supports petitioners' interpretation of the district court's treatment of the cost savings motive -- that interpretation being: the generation of cost savings was a motive not only for conducting the RIF but also for the specific decisions resulting in Quinn's discharge. This evidence comes principally from FTC documents introduced at trial and from the trial testimony of one of its own witnesses -- Barbara Clark, the BC Deputy Director responsible for making the decisions resulting in BC employment separations.

In summation, the record evidence in this regard is as follows. The agency provided Clark with a worksheet which reported net savings information that would result from the termination of 27 specifically identified BC employees, including Quinn. Appellants' C.A. Br. 7-8. The worksheet reported the savings expected from the termination of Quinn's employment to be $28,605, or nearly one-fifth of BC's entire cost savings objective. *Id.* Clark used the worksheet to determine which BC employees to terminate in order to meet its $150,000 cost savings goal and Quinn was among those she selected for termination.

2. Respondents do not dispute that the 17 BC employees excluded from petitioners' statistical comparison showing the disparate impact from the *staff imbalance abatement practice* -- the seven SES employees, the six employees exercising the early-out retirement option, and the four discharged student temporaries -- "were not affected by" said practice. Opp. 5-6. Nevertheless, respondents contend that the district court was correct in concluding that these 17 employees should have been included in the statistical comparison. *Id.* This was so, according to the respondents, because "[t]he district court determined . . . that the agency's responses to the budget shortfall were best viewed as interrelated components of a single employment practice that affected all employees, rather than as a series of discrete, independent decisions whose effects should be separately analyzed." *Id.* 6, *citing*, Mem. Op., Pet. App. B17.

Once again, respondents have attributed to the district court a determination that it did not expressly make. In truth, the district court never explicitly narrated the

foregoing determination as a reason for concluding that the at-issue 17 BC employees should have been included in petitioners' statistical comparison, as respondents contend. Such a determination does not appear on the page of the district court Opinion cited by respondents (Mem. Op., Pet. App. B17) or, for that matter, on any other page.

Perhaps respondents are assuming that the aforementioned determination can be inferred from the district court's conclusion that the 17 BC employees not affected by the *staff imbalance abatement practice* should have been included in petitioners' statistical comparison. Such an inference, however, would violate sound, judicially accepted concepts underlying disparate impact analysis. Courts universally recognize that "[d]isparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the . . . [employment decision] process." *American Federation of State, County, & Municipal Employees v. State of Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985) (citations omitted).

In the instant case, it is important to recognize that there were at least two "clearly delineated employment practice[s]," *id.*, implemented by the respondents to alleviate the fiscal year 1989 budget shortfall. These two practices were each "applied at a single [but different] point in the . . . [employment decision] process." *Id.* First, the respondents adopted an employment practice of taking actions to limit the size of the RIF, and, to this end, decided to terminate the four student temporaries and to allow six employees to take early-out retirement. Second, the respondents then adopted an employment practice of

targeting positions for abolishment during the RIF on the basis of perceived grade-skills mix imbalances, *i.e.*, the *staff imbalance abatement practice.*

It is the second, not the first, of the two foregoing employment practices that petitioners are challenging in the instant case as causing a disparate impact on BC employees over age 39. Therefore, the district court's contrary holding aside, the statistical data reflecting the disparate impact from the second implemented employment practice (the *staff imbalance abatement practice*) should not be contaminated with the employees who were affected by the first implemented employment practice.

Respondents' argument supporting the district court's specific determination for the inclusion of the six BC employees exercising the early-out retirement option in petitioners' statistical comparison truly begs the question. The simple fact that "the early-out option taken by six employees was available only because the FTC was undergoing a RIF," Opp. 6, in no way shows that the employees accepting the early-out offers should be included within the group of "qualified" employees comprising the population of employees occupying jobs eligible for abolishment during the actual implementation of the RIF itself.

For disparate impact analysis, it is only the employees whose positions are eligible for abolishment during the implementation of the RIF that, as a matter of law, should be included in the base population for comparison with the "at-issue" employees, *i.e.*, those employees who are adversely affected during the RIF by

application of a challenged business practice. *See, Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650-51 (1989). As petitioners have shown, the employees accepting the FTC's offer of early-out retirement do not fit into either category. Pet. 13, 17. In other words, since they had accepted early-retirement, their positions were no longer "qualified" for abolishment during the implementation of the RIF; likewise, since they "were not affected by" application of the *staff imbalance abatement practice*, Opp. 5-6, they were not "at-issue" employees. Thus, it was proper to exclude the early-out retirees from petitioners' disparate impact statistical analysis.

Moreover, the fact that "had . . . [the six BC] employees not exercised an early-out option, they would have been vulnerable to the RIF," Opp. 6, as respondents contend, only reinforces the appropriateness of not including those employees in the statistical comparison showing the disparate impact of an employment practice applied during the RIF process. The fact remains that these six BC employees were not "vulnerable to the RIF," *id.*, and to the *staff imbalance abatement practice* applied during the RIF because these six employees had elected to exercise the early-out option *before* the RIF process and said practice were even implemented.[2]

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[2] It is common knowledge that, when an agency of the federal government contemplates a RIF, it will first offer early-out retirements to its eligible employees in order to mitigate the number of positions that it would have to abolish through the RIF process. Common sense dictates that an agency would defeat the purpose of an early-out retirement offer if it were to abolish an employees' position through the RIF process *after* the employee accepts the agency's offer of an early-out retirement. Thus, it is clear that federal agencies treat positions occupied by

In their final argument, respondents do not dispute that the district court made no specific business necessity finding with respect to the at-issue *staff imbalance abatement practice*. *Id.* 6-7. Respondents contend, however, that the FTC introduced evidence at trial showing that "it carried out the RIF by eliminating the positions . . . [that] would least interfere with . . . its mission." *Id.*

Petitioners agree that the FTC introduced the foregoing evidence. However, the simple fact that such evidence was introduced does not mean that it would persuade the district court that the *staff imbalance abatement practice* was a business necessity. This is so particularly in light of the fact that the FTC did not introduce any oral or documentary evidence at trial to show that BC was unable to fulfill its mission with the alleged grade-skills mix imbalances existing prior to the RIF. Indeed, there is record evidence showing that BC could in fact fulfill its mission with the alleged grade-skills mix imbalances existing prior to the RIF. *See*, Pet. 19, n. 9.

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employees accepting early-out retirement offers as already having been abolished *before* deciding which positions need to be abolished through the formal RIF process. For this reason alone, it was proper not to include the six early-outs within the "qualified" population of BC employees eligible for the RIF.

CONCLUSION

For the reasons stated here and in the petition itself, it is requested that the petition be granted.

Respectfully submitted,

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